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MCLE SELF-STUDY

The "Denominator Problem"

Defining the Property Against Which a Regulatory Taking Must be Measured

By Anthony Saul Alperin

I. Introduction

The Takings Clause of the Fifth Amendment to the United States Constitution provides, "nor shall private property be taken for public use, without just compensation." [1] Originally, the Takings Clause applied solely to actual appropriations and physical invasions of land and personal property. However, in 1922, the United States Supreme Court, in Pennsylvania Coal Co. v. Mahon,[2] stated that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[3] That decision gave birth to the law of "regulatory takings." It is an area of land use law that has generated much debate and which has to a large extent confounded the courts as well as property owners, environmentalists, neighborhood activists and those charged with regulating the use of land for the public good.

Over the years, the United States Supreme Court has struggled with defining when regulation "goes too far." It has attempted to develop a test that it and other courts can use to determine whether a law regulating the use of land or decisions denying or conditioning development permits result in a compensable taking. Essentially, the Court's approach has been to look to three factors: (I) the extent to which the regulatory action interferes with reasonable investment-backed expectations, (ii) the economic impact of the regulatory action and (iii) the extent to which the regulation or permit decision advances the public interest.[4] In Agins v. California,[5] the Court set forth a two-prong test: (I) does the regulatory decision "substantially advance legitimate state interests" and (ii) does it deprive the owner of "economically viable use" of the land?[6]

A deprivation of all use of land will almost always result in what the Supreme Court has called a "categorical taking."[7] However, there may be some circumstances where a regulatory decision has a drastic economic impact but leaves the owner with some minimal use or value and where the courts must weigh the extent of the economic deprivation against the strength of the government interest in determining whether a taking has occurred.

II. The Need to Define the "Denominator"

Property is often viewed for takings purposes as a "bundle of sticks," with each

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stick representing a separate property "right." If the government takes away one or a few of the sticks, the courts usually conclude that there has not been a taking because the owner is left with other valuable sticks in the bundle. However, if the government regulation takes away all – or in some cases almost all – of the sticks, the government's action will usually result in a taking, and the owner will become entitled to compensation.

The Supreme Court, in Keystone Bituminous Coal Assn. v. DeBenedictis,[8] stated that, because takings analysis "requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"[9] In order to determine whether an owner has been deprived of all "economically viable use" of the owner's land, we need to know not only the impact of the regulatory action but the "property" against which the impact must be measured. It therefore becomes critical to determine the "denominator" of the fraction. For purposes of analysis, the "numerator" of the fraction is identified as the value or rights "taken" by government action, and the "denominator" is the entirety of the owner's property. When the numerator and denominator are the same, or when the numerator approaches the value of the denominator, a taking has usually occurred.

The need to determine the "denominator" arises in one or more of the circumstances discussed below:

- where the government prohibits or limits one of many "uses" or "rights" to a parcel of land;
- where the government's action prohibits any uses on some but not all of the area owned; or
- where the government prohibits or prevents any use for a limited period of time.

III. Can one out of many "uses" or "rights" constitute a separate property interest that can be "taken"?

The laws in some states allow property owners to separate out distinct rights or estates and convey them to others. If a land use regulation prohibits or severely limits the exercise of the rights that have been or could be conveyed, do we say that the owner of those rights has suffered a taking? Similarly, land use decisions might prohibit or restrict certain uses or the exercise of specific rights on a single parcel of land. Does a regulation which restricts the height or intensity of development, prohibits the most profitable uses or prevents the sale of the property result in a taking? At least four important United States Supreme Court decisions deal directly with these issues.

The first two, Pennsylvania Coal Co. v. Mahon[10] and Keystone Bituminous Coal Assn. v. DeBenedictis,[11] relate to Pennsylvania's attempts to regulate the effects of coal mining in that state on the safety and stability of the surface above the mining operations. Pennsylvania law divides property into what can be viewed as "functional" or "vertical" estates: the mineral estate, the surface estate and the support estate. Usually, the mineral and support estates are owned by coal mining companies, and the surface estate is owned by those who live and do business on the surface. One of the rights of the owner of the support estate is the right to cause damage to the surface as a result of the extraction of coal that supports it. In order to protect the safety of those living and working above the mines, Pennsylvania has limited the amount of coal that may be mined, requiring the owners of the mines to leave intact a large portion of the minable coal. In the Pennsylvania Coal case, the Supreme Court viewed the mining company's support estate as a separate interest that could be "taken" and determined that the severity of the government's restriction on that "property" – essentially the abolition of an estate in land – was not justified by the government's countervailing regulatory interests. In Keystone, the Court took what has become the modern approach and declined to treat the support estate as property that is separately protected by the Takings Clause.

The third case, Penn Central Transportation Co. v. New York City,[12] involved New York City's historic preservation law. Because Penn Central's Terminal Building in Manhattan had been declared an historic landmark site, the city's law prohibited the owner from constructing an office tower above the existing terminal. The owner sought damages for a taking, claiming that the law deprived it of the use of its "air rights" above the building. The Supreme Court rejected this attempt to break down the parcel into separate functional interests, treating the owner's relevant property interest to be its rights in the "parcel as a whole,"[13] stating that "[t]akings jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated."[14] Therefore, the Court compared the "extent of the interference with rights in the parcel as a whole - here, the city tax block designated as the 'landmark site.'"[15]

The fourth case, Andrus v. Allard,[16] involved federal statutes which protect certain species of birds. The Secretary of the Interior adopted regulations to implement the Eagle Protection Act[17] and Migratory Bird Treaty Act.[18] One of those regulations prohibited commercial transactions involving feathers and similar parts of birds that were legally killed before the birds were protected by the Acts. Persons engaged in the trade of Indian artifacts, including eagle feathers, filed a lawsuit claiming in part that the regulations result in a compensable taking of their right to sell legally acquired artifacts. The Supreme Court held that prohibition on selling artifacts

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containing eagle feathers did not violate the Takings Clause, reasoning in part that the restriction interfered with some, but not all, of the owners' rights in the artifacts:

> " The regulations . . . do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' in the bundle is not a taking, because the aggregate must be viewed in its entirety. . . . [A]ppellees retain the rights to possess and transport their property, and to donate or devise the protected birds."[19]

IV. What is the relevant parcel when no use is allowed over part of an owner's land?

The need to identify the relevant denominator arises as well in the context of a land use decision which prevents all or virtually all use of a horizontal portion of an owner's land. One of the cases considered to contain an important discussion and application of the issue is Loveladies Harbor, Inc. v. United States.[20] That case involved the denial of a permit by the Army Corps of Engineers to fill land designated as protected wetlands. The permit was sought in order to allow the completion of the final stage of a development project. The application related to 12.5 acres of wetlands that was originally part of a larger, 51-acre proposed development project. The 51-acre parcel was in turn part of a larger tract that the owner had previously purchased, developed and then sold.

After the permit was denied, the owner filed suit seeking damages for a taking. One of the issues before the court was whether the relevant "denominator" parcel was the 12.5 acres for which the permit was sought, the 51-acres that made up the entire final stage of the development project or the much larger parcel that had already been developed by the owner. Choosing the 12.5 acres as the denominator would lead to a conclusion that the permit denial should be treated as a total deprivation of use and therefore a taking. Picking the 51 acres might or might not result in a conclusion that the permit denial constituted a taking, depending on whether the denial of the permit would prevent any economically viable development of the remaining 38.5 acres. Selecting the larger tract as the denominator, most of which had already been developed and sold, would most certainly have resulted in a finding that no taking had occurred. Because the state permit also needed for the project required the owner to transfer the other 38.5 acres to the state as a condition of its permit, the only portion of the owner's land that could be developed was the 12.5 acres for which the permit was sought. Given that fact, the court concluded that the relevant denominator parcel was the 12.5 acres still in the effective possession of the owner.

Although the particular facts of the Loveladies case led the court to treat only a portion of the owner's land for which a permit was sought as the relevant denominator, the courts have generally refused to utilize the "bright line" approach that has been urged by property owners – to designate as the denominator parcel the portion of the owner's property over which a permit is sought.

V. Can property interests be divided into "temporal" segments that can be separately "taken"?

The courts have also recognized that property rights can theoretically be broken into temporal segments. A moratorium on development can leave land in an undeveloped state for several months or even years, and a delay in obtaining needed permits could have the same effect. Whether a moratorium or permit delay can result in a compensable taking depends in part on whether the courts will recognize the temporal slice during which the land remains without a valuable use.

One of the allegations of the owners in Agins[21] was that, because the city initiated and then abandoned condemnation proceedings a year later, its "aborted attempt to acquire the land through eminent domain had destroyed the use of the land during the pendency of the condemnation proceedings."[22] Both the California Supreme Court and the United States Supreme Court rejected that claim. The nation's high court stated "that the municipality's good faith planning activities, which did not result in" condemnation did not unduly burden their "ability to sell their property."[23] Although their ability to sell "was limited during the pendency of the condemnation proceedings," they "were free to sell or develop their property when the proceedings ended."[24] The Court did not accept the owners' claim that the Court should view the time period during which their ability to sell was impeded by the city's action as a separate property interest that could be "taken" by the government's actions.

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,[25] the Ninth Circuit rejected a facial challenge to a development moratorium in the Lake Tahoe Basin on much the same grounds. The owners of land subject to the moratorium (which did not totally prohibit but severely limited development) claimed that they had suffered a "categorical" temporary taking for the period during which the moratorium remained in effect. They specifically asked the court to "define narrowly, as a separate property interest, the temporal 'slice' of each fee that covers the time span during which" the moratorium was "in effect."[26] Had the court accepted the owners' proposed denominator, the numerator (the time during which they could not use their land) would have been the same as the denominator. The obvious result could have been that the owners suffered a temporary taking for that period. The Ninth Circuit rejected the owners' contention, stating that "most modern case law rejects the invitation of property holders to engage in conceptual severance, except in cases of physical invasion or occupation."[27] The court found an analogy to those instances where a land use regulation denies all use over some but not all of an owner's land: "A planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use of a discrete portion of property . . . ."[28]

A. Temporary Takings under First English

The idea that a regulatory delay in an owner's ability to develop land can result in a "temporary" taking arises in part from a misunderstanding of the United States Supreme Court's use of that term in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles.[29] It is therefore useful in this context to review what that Court actually said – and did not say – about temporary takings.

The issue before the United States Supreme Court in First English was whether a land-owner whose property is taken by government regulation is entitled to compensation, or whether the owner's sole

remedy is a declaratory judgment or a writ of mandate invalidating the offending regulatory action. Although California courts had previously ruled that invalidation is the only remedy for a regulatory taking, no one should have been surprised when the Supreme Court held that when property is taken by the government, compensation of the owner is required. The Fifth Amendment's Takings Clause does read: " . . . nor shall private property be taken without just compensation." In essence, it is not the taking but the failure to pay compensation that violates the Constitution.

The Supreme Court in First English did not determine that the county's moratorium had resulted in a taking of the church's property. It did hold that, if on remand the California courts determined that the moratorium resulted in a permanent taking, the county could not avoid the requirement to pay compensation by simply rescinding its ordinance. The government could, of course, rescind its regulatory action, but that recision would not relieve the government of the obligation to compensate the owner for any loss incurred. The Court stated that "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which a taking was effective."[30] The Court said, however, that "normal delays" in the process of obtaining development approval would not constitute a taking.[31]

B. Development Moratoria

A development moratorium is often used to maintain the status quo on the ground during the time that it takes the government to properly plan for the scale and type of use appropriate for an area. A "moratorium" usually prohibits all use for a limited period. What we typically call an "interim control ordinance" or ICO sets a floor of allowable development and often requires special use permits to authorize development above the standard floor. Regardless of whether the regulatory device is a moratorium or an ICO, an owner may well be prevented from developing the land involved within the owner's chosen timetable. As discussed above, the Tahoe-Sierra case has effectively immunized a reasonable moratorium or ICO from a takings challenge.

Owners filing takings challenges to these land use tools claim that they render their land temporarily valueless. In Tahoe-Sierra,[32] the Ninth Circuit rejected that thesis. The court reasoned that a temporary prohibition on use does not "render the plaintiffs' property valueless. . . . Given that the [moratorium] banned development for only a limited period, these regulations preserved the bulk of the future developmental use of the property. This future use had a substantial present value."[33]

C. Regulatory Delay

California courts have ruled that under some circumstances a delay in the approval of a development permit can result in a temporary regulatory taking of the owner's property. The issue in each case has turned on whether the court believed the delay was "normal" within the meaning of the First English Court's caveat that "normal delay" does not constitute a taking.

The leading case on permit delay in California is Landgate, Inc. v. California Coastal Commission.[34] The California Supreme Court in that case ruled that a delay in obtaining development approval from the Coastal Commission, caused by the Commission's mistaken assumption of jurisdiction over the development project, did not constitute a temporary regulatory taking. Believing that a prior lot line adjustment required its approval, the Coastal Commission denied a coastal permit because the owner had not obtained the Commission's approval of the adjustment. The owner filed a lawsuit seeking a writ of mandate and damages for a taking. The trial court concluded that the Commission did not have jurisdiction over the lot line adjustment and issued the writ, ordering the Commission to reconsider the application without regard to the lot line question. On remand, the Commission approved the coastal permit.

Ruling on the takings issue, the trial court determined that the delay in issuance of the permit was a taking "because Landgate has been deprived, at least temporarily, of all economically viable or productive use of its property . . . ."[35] The California Supreme Court reversed, concluding that the temporary denial of all use resulting from a legally erroneous permit denial and the owner's success in obtaining judicial relief "is a normal part of the development process, and the fact that a developer must resort to such a determination does not constitute a per se temporary taking."[36] In dicta, the Court distinguished the case where the government's decision "was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it."[37]

In a case preceding Landgate, the Court of Appeal in Chandlis Securities Company v. City of Dana Point[38] approached whether a delay in obtaining a permit approval is a temporary taking on the basis of whether the government's action is "unreasonable," stating that "unnecessary delays in approving a proposed development or repetitive denials of specific plans complying with the city's general plan will amount to a taking."[39] The Court ruled that in the case before it, involving the voters' denial of a development project through the initiative process, the rejection of the proposed development was not a "final decision denying plaintiffs all economically viable use of the property."[40] Therefore the city's action did not result in a taking.

In Ali v. City of Los Angeles,[41] the Court of Appeal applied the "unreasonable delay" dicta in Landgate to hold that the denial of a demolition permit resulted in a temporary taking because the city should have known that a state law, the Ellis Act, required the issuance of the permit. The owner of a fire-damaged residential building in downtown Los Angeles sought a permit to demolish the building. The Department of Building & Safety, believing that the building was a single room occupancy (SRO) hotel subject to a demolition moratorium, refused to issue the permit until the status of the building as an SRO hotel was clarified. After unsuccessfully seeking a writ of mandate requiring the city to issue the permit, the owner provided the city with information indicating that the building was not an SRO hotel. The demolition permit was then issued.

The owner sought damages for a temporary taking based on the city's initial permit denial. The Court of Appeal determined that the city should have known that the Ellis Act (which precludes cities from preventing residential landlords from going out of the rental business) required the issuance of the permit. The court acknowledged the holding in Landgate but concluded that "the erroneous denial of a demolition permit, in violation of the Ellis Act[42] . . ."[43] was not "merely a 'normal delay' in the 'development process' as explained in Landgate."[44] It held that the permit denial in Ali "was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project . . . ."[45] Because the denial denied the owner use of the property during the period

between the denial and the subsequent issuance of the permit, the court held that there had been a temporary taking for that period of time.

Endnotes

1 United States Const., Fifth Amend.
2 260 U.S. 393 (1922).
3 Id. at 415.
4 See, Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124-125 (1978).
5 447 U.S. 255 (1979).
6 Id. at 260.
7 Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
8 480 U.S. 470 (1987).
9 Id. at 497, quoting Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1192 (1967).
10 260 U.S. 393 (1922).
11 480 U.S. 470 (1987).
12 438 U.S. 104 (1978).
13 Id. at 130.
14 Id.
15 Id. at 131.
16 444 U.S. 51 (1979).
17 16 U.S.C. § 668, et seq.
18 16 U.S.C. § 703, et seq.
19 444 U.S. at 65-66.
20 28 F.3d 1171, 1180 (Fed. Cir. 1994).
21 447 U.S. 255 (1979).
22 Id. at 258.
23 Id. at 263.
24 Id.
25 216 F.3d 764 (9th Cir. 2000).
26 Id. at 774.
27 Id.
28 Id. at 776.
29 482 U.S. 304 (1987).
30 Id. at 321.
31 Id.
32 216 F.3d 764 (9th Cir. 2000).
33 Id. at 781.
34 17 Cal.4th 1006 (1998), cert denied, 525 U.S. 876 (1998).
35 Id. at 1015.
36 Id. at 1030.
37 Id. at 1024.
38 52 Cal.App.4th 475(1996).
39 Id. at 484.
40 Id.
41 77 Cal.App.4th 246 (1999), rev. denied, Cal. Supreme Court Minute 03-29-2000, cert. Denied, U.S. 2000 US Lexis 5205 (US Oct. 2, 2000).
42 Cal. Gov. Code § 7060, et seq.
43 77 Cal.App.4th at 253.
44 Id.
45 Id. at 254

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MCLE SELF-ASSESSMENT TEST

1. A city violates the Takings Clause of the Fifth Amendment by zoning a parcel of land for open space and allowing no productive uses.

   ❑ True ❑ False

2. Regulating the use of land, as opposed to direct appropriations of land, never results in a "taking" within the meaning of the Takings Clause.

   ❑ True ❑ False

3. A zoning ordinance will result in a "taking," requiring the payment of just compensation, if the ordinance leaves the owner without any economically viable use of the land.

   ❑ True ❑ False

4. A zoning ordinance which leaves an owner with some valuable use of the land does not result in a "taking," even if the ordinance serves no legitimate government interest.

   ❑ True ❑ False

5. A "categorical taking" occurs when the government leaves an owner with no use of the owner's land at all.

   ❑ True ❑ False

6. A land use decision which leaves the owner with some valuable use and advances a legitimate government interest will never result in a taking even if the decision significantly reduces the value of the property.

   ❑ True ❑ False

7. In order to determine whether a decision regulating land has deprived an owner of any economically viable use, all the court needs to know is the nature of the use that the decision will not allow and the extent to which it is not allowed.

   ❑ True ❑ False

8. A land use decision which prohibits the highest and best use of the land will constitute a taking even if the owner can use the land for less profitable purposes.

   ❑ True ❑ False

9. If the government does not allow an owner to develop "air rights" above an existing building - representing additional development potential on the lot - the government's action results in a "taking" of those rights.

   ❑ True ❑ False

10. If someone buys 200 acres of residentially zoned land and is then denied a permit to develop 30 of those acres, the owner usually cannot successfully pursue a takings claim by arguing that it has been left with no use of the 30-acre portion of the owner's larger parcel.

    ❑ True ❑ False

11. If a landowner needs both state and federal permits in order to develop a parcel of land, the denial of the federal permit for one half of the parcel may result in a taking if the owner was required to transfer the other half to the state as a condition of the state's approval of its permit for the first half.

    ❑ True ❑ False

12. A government requirement, imposed for a legitimate reason, requiring a landowner to leave a portion of a development site as landscaped open space, will result in a taking of the area required to be left in that condition.

    ❑ True ❑ False

13. Prohibiting the sale, but not the use or other distribution, of tangible items of personal property can form the basis for a takings claim.

    ❑ True ❑ False

14. Under the United States Supreme Court's First English decision, a "temporary taking" results whenever government regulation prevents the use of land for a limited period of time.

    ❑ True ❑ False

15. The government may temporarily restrict or even prohibit the development of land in order to preserve the status quo while the government decides how much development to allow in the long run without having to pay compensation for a temporary taking during the time when the property may not be developed.

    ❑ True ❑ False

16. Any delay in approving a development permit will give rise to a valid takings claim by the owner.

    ❑ True ❑ False

17. If a developer successfully challenges a permit denial in court, the delay caused by the need to obtain judicial relief will constitute a temporary taking of the owner's property.

    ❑ True ❑ False

18. Delay in approving a permit may result in a taking if the government action resulting in the delay is so unreasonable from a legal standpoint that the courts would conclude that the action was taken only to delay the project.

    ❑ True ❑ False

19. Within the meaning of regulatory takings law, "conceptual severance" means that a court should not divide its opinion into several different elements.

    ❑ True ❑ False

20. According to the court in Tahoe-Sierra, the courts should never engage in "conceptual severance."

    ❑ True ❑ False

E-GOVERNMENT

And the Use of Electronic Signatures

By: Jeffrey H. Goldfien

Introduction

Increasingly, public agencies are turning to electronic means of conducting the public's business. From e-mail, to e-permitting, to e-enforcement, to e-procurement, public agencies are following the lead of the private sector and turning to computers and other information technologies to bring an additional measure of efficiency and convenience to their constituents, as well as to their own operations.

This article discusses two State legislative initiatives that are paving the way towards an increasing reliance by government on electronic information systems. It is intended as an introduction to the legislation, and an initial guide to the legal considerations involved in moving towards the use of such systems.

The first legislative enactment discussed below pertains to electronic signatures, while the second pertains to digital signatures. It is important, at the outset, to distinguish these two terms, as used by the Legislature.

Electronic Signature is the broader term, defined as "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record." Civil Code section 1633.2 (h).[1] Simply put, it is any symbol or method used by a party with the present intention to be bound by or to authenticate a record or document, using electronic means, including digital signatures. Thus, for example, it would include the standard "click through" process whereby a consumer, at the end of reading the on-screen licensing agreement for newsoftware, uses her mouse to click "I agree," thereby consenting to the terms of the license agreement.

Digital signature is a term of art, often used to denote the use of encryption technology to enable a computer user to transmit secure communications over the Internet or through any other open or closed network with a signature that has the same legal force and effect as a traditional handwritten signature on paper. The security features of a digital signature allow networked communications to be authenticated, confidential, and nonrepudiable. As such, a digital signature is a specific type of electronic signature.

The Uniform Electronic Transactions Act

1. Purpose and Applicability

In 1999, the State Legislature adopted SB 820, the Uniform Electronic Transactions Act, adding sections 1633.1 through 1633.15 of the Civil Code ("UETA").[2] The provisions of UETA became effective on January 1, 2000. This model legislation has also been adopted by Congress, in substantially the same form, as part of S.761, the "Electronic Signatures in Global and National Commerce Act," signed by President Clinton earlier this year and effective October 1, 2000.[3]

UETA has a very limited objective: to place electronic documents and the use of electronic signatures on a par with traditional paper-based transactions and the use of manual signatures. It is intended to eliminate any doubt about the enforceability of electronic transactions, and thereby remove barriers to their use in the business, commercial, and public sectors. UETA does not attempt to create a new set of legal rules for the electronic marketplace, and the law governing contracts generally remains fundamental to assessing disputes involving electronic transactions.

UETA applies to "electronic records and electronic signatures relating to a transaction."[4] Section 1633.3 (a). UETA defines electronic record as "a record created, generated, sent, communicated, received, or stored by electronic means." Section 1633 (m). And "transaction" is defined as "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs." Section 1633.2 (o) (emphasis added). This definition of transaction constitutes a limitation inherent to UETA, such that unilateral actions not involving other persons remain outside its purview. However, UETA does apply to all the electronic records and signatures related to a transaction, and so would cover, for example, e-mails, reports, memorandums, accounting records, or other electronic documents prepared in connection with a transaction.

It is important to note, also, certain qualifications to the applicability or scope of UETA: 1) UETA does not require records or signatures to be in electronic form; 2) UETA applies only to transactions where the parties have voluntarily agreed to conduct the transaction by electronic means, and a party may refuse to conduct subsequent transactions by electronic means; and, 3) the parties may, with certain important exceptions,[5] agree to vary the terms of UETA as it applies to a particular transaction or relationship. Section 1633.5.

2. Substantive Provisions

The heart of UETA is section 1633.7:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
(c) If a law requires a record to be in writing, an electronic record satisfies the law.
(d) If a law requires a signature, an electronic signature satisfies the law."

Again, the intention is simply to recognize and authorize the conduct of

business, commercial, and governmental affairs using electronic means. All other provisions in UETA are meant to support and effectuate the straightforward declaration of this section.

3. Additional Provisions

UETA provides that for an electronic record to be effective, it must be capable of being retained by the recipient. Section 1633.8 (a). The sender cannot inhibit the ability of the recipient to print or store the record.

Parties, including government agencies, must still comply with all other laws governing the manner in which certain documents are to be posted or displayed, sent or communicated, or those governing the contents or formatting of the record. Section 1633.8. For example, if the parties have agreed that certain legally required notices may be transmitted electronically, the notice must contain the information and formatting required by law, if any, and must be published, or posted for public viewing, in the usual manner and locations where required by law.

Anticipating certain difficulties arising from the often anonymous character of electronic transactions, UETA states simply that an electronic record is "attributable to a person if it was the act of the person." Section 1633.9 (a). The parties can establish attribution in any manner, including "the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." Section 1633.9. The use of the term "security procedure" recognizes certain procedures, electronic or otherwise, designed to overcome problems of attribution, and supplements traditional methods of attribution, such as looking to the content of the record, or the course of dealing between the parties.[6]

UETA provides guidance in the event there is a change or error in an electronic record that results in a dispute. Under section 1633.10 (1), a party utilizing an agreed upon security procedure may be able to avoid the effect of the change or error if another party has not conformed to the security procedure. Similarly, if an individual utilizing an automated electronic procedure makes a mistake, that individual may avoid the consequences of the mistake by following specified procedures. Section 1633.10(2).

UETA specifically authorizes use of electronic records when notarized signatures are required, or where statements must be signed under penalty of perjury. Section 1633.11. UETA authorizes use of electronic records where retention of documents and other records is required by law. Section 1633.12. And, evidence of a record or signature in electronic form is made admissible in later proceedings. Section 1633.13. Finally, UETA recognizes that enforceable transactions can occur between "electronic agents" of the parties, i.e. without any human interaction or oversight. Section 1633.14.

4. UETA Summary

UETA applies to transactions that the parties have agreed to conduct electronically. Under most circumstances, electronic records and electronic signatures may now be used in place of traditional paper-based and handwritten methods. In the area of records retention, electronic records may replace other methods so long as there is assurance the electronic records will provide the accuracy, integrity, and accessibility of traditional methods of retention.

California's Digital Signature Law

The Legislature's initial efforts in the area of electronic commerce preceded the adoption of UETA, when it enacted Government Code section 16.5, authorizing the use of "digital signatures" by all public entities. Digital signatures, as discussed in the introduction to this memorandum, is a category of technology developed to address certain legal and technical concerns around the use of electronic means in conducting private and public affairs.[7]

Government Code section 16.5 (a) provides that a digital signature shall have the same force and effect as a manual signature so long as it has the following attributes:

1. It is unique to the person using it;
2. It is capable of verification;
3. It is under the sole control of the person using it;
4. It is linked to data in such a manner that if the data are changed, the digital signature is invalidated;
5. It conforms to regulations adopted by the Secretary of State.

The Secretary of State has promulgated regulations governing the standards for and use of digital signature systems by public entities. [8] Under the regulations, public entities who wish to utilize digital signatures must: 1) employ an "acceptable technology" as defined and as determined by the State of California; and 2) comply with specified criteria in determining to accept a digital signature. California Code of Regulations ("CCR"), sections 22001-22005.

Under the regulations, the two "acceptable technologies" currently listed by the State are known as "Public Key Cryptography," and "Signature Dynamics." A discussion of these technologies, however, is beyond the scope of this memorandum, and is the province of technical professionals.[9] However, a general discussion of the legal considerations involved in employing digital signature technology, and electronic signatures in general, follows.

Legal Considerations

The list of capabilities required for digital signature systems found in section 16.5 (a), and set forth above, delineate the major concerns involved in electronic transactions in general. Most of the considerations involved in planning, installing, and implementing such systems will be technical,

but it is important that legal analysis and review be sought at appropriate points in the process.

The key concepts of the analysis can be described using the following terms:

Authentication: Ascertaining the identity of a party to a message or transaction

Access Control: Assuring that information and other network resources are available only to authorized parties

Confidentiality: Maintaining secrecy from unauthorized parties of the contents of messages or the substance of transactions

Message integrity: Insuring that messages and transactions are accurate and have not been modified or otherwise tampered with in transit over the computer network

Non-repudiation: Providing sufficiently strong evidence tying the identity of a party to the substance of a message or transaction at a certain time, in order to rebut that party's subsequent denial of the message or transaction

The importance of these factors, and the degree to which a public entity must seek to overcome potential problems of these kinds in conducting electronic transactions, will vary depending upon the nature of the transaction. A different weighting of these considerations may govern the choice of systems and level of security for procurement activities, versus those for code enforcement or permitting, for example.

Moreover, the information technologies underlying this discussion are new and constantly evolving, and neither the Legislature nor the courts have been willing or able to provide clear direction up to this point. Consequently, electronic transactions are an area with inherent legal risks for cities. Nonetheless, and while caution is of course advisable, the advantages – some might say necessity – of developing this capability appear to grow each day.[10]

Because tremendous amounts of resources can be consumed trying to achieve high levels of information security, we think courts will recognize the need to balance the level of security against the overall benefit to the public of the technology. The question to consider should be whether the level of security employed, in a system designed and implemented to create electronic records and signatures, is appropriate to the purposes for which it is created. Developing answers to this question will necessarily require consideration and balancing of a broad range of financial, technical, legal, and other relevant factors. We believe that courts will not require perfection or omniscience on the part of cities using these technologies.

Conclusion

The Legislature has broadly authorized the use of electronic records and electronic signatures in California. Additionally, the Legislature has given public entities authority to utilize a specific category of technology, digital signatures, in conducting the public's business. Along with technical and financial considerations, legal considerations must be addressed at appropriate points in the process of planning, purchasing, implementing, and operating electronic systems for such purposes. Thoughtful evaluation of key concerns will allow cities to address, if not completely overcome, the risks of electronic transactions, and bring the tremendous potential benefit of these new technologies to the public sector.

Endnotes

1 Subsequent references are to the California Civil Code, unless otherwise noted.

2 The Legislature adopted substantially all provisions of the model legislation, omitting only those sections deemed optional by the authors, as well as provisions concerning "transferable records" under the Uniform Commercial Code. The Legislature also enacted certain California-specific exemptions to UETA, as anticipated by the authors of the model legislation, none of which have particular significance for public entities.

3 S. 761 provides that states, such as California, that have adopted their own version of UETA, need not comply with the federal legislation.

4 "Electronic record" is defined, at section 1633 (m) as "a record created, generated, sent, communicated, received, or stored by electronic means."

5 For example, the parties may not waive the voluntary nature of the electronic transaction. Section 1633.5 (b) and (c). See, also, sections 1633.5 (d), 1633.8 (d), 1633.10 (4), 1633.15 (g), and 1633.16.

6 UETA does not affect the legal consequences of such an attribution, however. UETA expressly states that it does not displace existing substantive rules concerning transactions, such as the law of contracts or agency, nor consumer protection statutes and regulations. Section 1633.9 (b). In other words, a contract will be found to exist or not based on settled rules of contract law, not whether the transaction was in whole or in part conducted through electronic means consistent with UETA.

7 UETA broadly acknowledges and authorized the use of electronic means to conduct business in the public and private sectors, but is "technology neutral" in the sense that it does not require nor favor the use of any particular technology in effectuating the use of such electronic means.

8 The current regulations are set forth at California Code of Regulations Title 2, Div. 7, Ch. 10, sections 22000 et seq., and may be found on the Secretary of State's web site at *http://www.ss.ca.gov/digsig/regulations.htm*.

9 The Secretary of State's website has a good general discussion of these technologies at *http://www.ss.ca.gov/digsig/digsigfaq.htm*

10 Several cities in Silicon Valley have already joined together to develop web-based permit systems. See, for example, the website at the City of Milpitas, *http://www.ci.milpitas.ca.us/3093.html*, or the City of Sunnyvale at *http://www.e-permits.net/sunnyvale*. Information on the joint venture can be found at *http://www.jointventure.org*.

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Ten Significant Land Use Decisions of 2000

*By John Eastman**

"Back to basics" seems to be a theme running through land use cases in 2000, with courts revisiting the nuts and bolts of variances, exhaustion of remedies, development agreements and CEQA.[1] The following is a summary of those decisions:

1. Woodward Park Homeowners Association v. Garreks, Inc., 77 Cal. App. 4th 880 (2000)

What happens if a developer proceeds with construction of its project in the face of pending CEQA litigation? Street-smart developers in that situation might tell you that even if they were to lose the CEQA action, the trial court would never order the removal of finished improvements. Woodward Park should change their minds.

In that case, the City of Fresno granted a conditional use permit and approved a negative declaration for a car wash adjacent to residential property. The Woodward Park Homeowners Association filed suit, asserting that an EIR should have been required. During the litigation, the developer (defendant Garreks) proceeded ahead with construction. The car wash was already open for business by the time that the Superior Court ordered the preparation of an EIR, and voided the conditional use permit.

The Court of Appeal upheld the authority of the Superior Court to order the preparation of an EIR, notwithstanding that the developer had completed the project prior to the Superior Court's ruling. The Court stressed that developers cannot avoid CEQA by making the calculated business decision of proceeding with construction in the face of litigation, creating further delay by filing an appeal, and then arguing that the case is moot because the project was completed in the interim.

The Court of Appeal did not actually require the developer to remove any improvements, but invited the Superior Court to make that order, if warranted by the City's decisions on remand.

2. Waste Management of Alameda County v. County of Alameda (Browning-Ferris Industries), 79 Cal. App. 4th 1223 (2000)

The vast majority of standing arguments raised by the government in land use cases are doomed to failure. A standing argument asserted by the government, however, actually succeeded in Waste Management of Alameda County v. County of Alameda (Browning-Ferris Industries).

In that case, real party Browning-Ferris Industries applied for a conditional use permit to accept non-hazardous waste at its landfill. Waste Management, a competitor of Browning-Ferris, operated a nearby landfill. When Waste Management had applied for a conditional use permit to accept non-hazardous waste at its landfill, the County had required an EIR.

When Waste Management learned that the County determined that Browning-Ferris' application was categorically exempt under CEQA, Waste Management filed a petition for writ of mandamus. The Superior Court set aside Browning Ferris' permits and ordered further CEQA review.

Reversing, the Court of Appeal held that a corporation that seeks to advance its commercial interests by challenging a competitor's project on CEQA grounds may not have a sufficient environmental interest to have standing.

The Court explained that a mandamus writ may be issued only to a beneficially interested party.[2] From this, the Court discerned a standing requirement: in order to have a beneficial interest in an action, and therefore standing, the petitioner's interests must be within the zone of interests protected or regulated by the asserted legal duty.

The Court surmised that Waste Management's interest was solely commercial: Waste Management identified as its injury its competitive disadvantage vis-á- vis Browning-Ferris by having to undergo environmental review. Such commercial interests do not fall within the zone of activity that CEQA was designed to protect, the Court determined.

The Court also dismissed Waste Management's contention that it had gained standing by objecting to the project at the administrative level. Raising arguments at the administrative level is an exhaustion of remedies requirement[3] that has nothing to do with standing, the Court concluded.

3. Breakzone Billiards v. City of Torrance, 81 Cal. App. 4th 1205 (2000)

Breakzone Billiards v. City of Torrance made numerous pronouncements in the areas of due process, bias, and conflicts of interest. In so doing, the Court of Appeal distanced itself from Cohan v. City of Thousand Oaks[4] and Clark v. City of Hermosa Beach,[5] two decisions whose bad facts created even worse law for public agencies.

In Breakzone Billiards, Torrance's planning commission granted Breakzone Billiards's application for a conditional use permit to sell alcoholic beverages and expand its billiards parlor. A city council member filed an appeal to the city council, as allowed by the Torrance municipal code.

Breakzone requested that four council members recuse themselves from the appeal hearing, on the grounds that they had received campaign contributions from the owner of the shopping center in which Breakzone was

located. The council members refused to recuse themselves.

The city council denied the conditional use permit application after a hearing de novo.

First, the Court of Appeal rejected Breakzone's argument that its due process rights were violated because it was never notified of its burden of proof. The Court explained that appeals before a city council are typically de novo hearings, even though they are styled as appeals. In a de novo hearing, the applicant usually has the burden of proof.

The Court exclaimed that the fairness of procedures for approving a conditional use permit is not measured against principles of due process. Applicants have no property right to a new conditional use permit, which are discretionary by definition. The fairness of an agency's procedures for approving a conditional use permit, however, may be examined under the standards of Code of Civil Procedure section 1094.5, which requires that a fair hearing be provided.

Turning to the issue of bias, the Court declared that a council member's receipt of a campaign contribution from the owner of property who has a lease with an applicant for a permit does not disqualify the council member from hearing the application, absent actual bias. Actual bias is established with concrete facts or a showing of personal embroilment in the controversy, neither of which Breakzone could establish.

Similarly, the mere fact that a city council member appealed a planning commission decision and participated in the same decision at the council level does not establish actual bias or personal embroilment, the Court added.

The Court distinguished Clark v. City of Hermosa Beach on the grounds that the council member charged with bias in that case stood to gain personally by denying the application, and had displayed personal animosity toward the applicant.[6] The Court distinguished Cohan v. City of Thousand Oaks for the reason that the Thousand Oaks municipal code, unlike the Torrance municipal code, did not expressly authorize council members to file administrative appeals.

The Court also determined that a common law conflict of interest is not created by a campaign contribution, without an express quid pro quo from the official who received the contribution. Even assuming that the doctrine of common law conflicts of interest is still viable, judges must exercise caution before finding a common law conflict of interest, the Court warned.

The Court concluded that substantial evidence supporting the City's decision to deny the conditional use permit, noting that land use decisions involving the sale of alcoholic beverages are particularly subject to local discretion.

4. Cucamongans United for Reasonable Expansion (CURE) v. City of Rancho Cucamonga (Lauren Development), 82 Cal. App. 4th 473 (2000)

Cucamongans United for Reasonable Expansion (CURE) v. City of Rancho Cucamonga (Lauren Development) affirms that lead agencies are not required to undertake CEQA review if the challenged decision is a denial of the project.

In that case, the Rancho Cucamonga planning commission had approved a negative declaration and tentative map in 1990 for a 40-unit residential subdivision, and imposed certain drainage conditions. At a city council hearing in 1997 concerning real party Lauren Development's design review application, CURE presented what it asserted to be new information regarding the drainage conditions. Although the city council denied Lauren Development's design review application and determined not to require a Supplemental EIR, CURE nevertheless filed a petition for writ of mandamus.

The Court of Appeal held that CEQA review cannot be required in connection with the denial of a project. Here, inasmuch as the city council denied Lauren Development's design review application, the City retained no discretionary approval to require the preparation of a Supplemental EIR.

5. Vedanta Society of Southern California v. California Quartet, Ltd., 84 Cal. App. 4th 517 (2000)

Query: a planning commission votes to certify an EIR. Opponents of the project appeal the planning commission's decision to the board of supervisors. If the board's decision ends in a tie vote, does the planning commission's decision stand, or does it become a nullity?

In Vedanta Society, the Orange County planning commission certified an EIR for the defendant's 705-unit housing project. The EIR identified various significant impacts.

Petitioner appealed to the Board of Supervisors. The Board's motion to adopt staff's recommendation and uphold the planning commission's certification ended in a 2-2 tie vote.

The Vice Chair announced that the vote upheld the planning commission's decision. The County thereafter proceeded on the assumption the EIR had been certified, and approved the defendant's tentative map.

The trial court ruled that the EIR was never certified and vacated the tentative map approval.

Affirming, the Court of Appeal held that if an EIR identifies an impact that cannot be mitigated to an insignificant level, a tie-vote by the elected decision-makers cannot result in the adoption of the planning commission's decision to certify the EIR.

The Court explained that the elected body to which an appeal has been made under CEQA must consider the EIR. If a significant impact is identified, that body must make findings regarding environmental impacts.[7]

The requirements of consideration and findings are incompatible with the notion of approval by acquiescence. Consideration and findings imply conscious, affirmative action, not adoption of the status quo by default or inaction. To hold otherwise would undermine CEQA, whose purpose is to expose elected decision-makers to the political heat of certifying an EIR, the Court opined.

The Court was careful to confine its decision to CEQA cases.

6. Tahoe Vista Concerned Citizens v. County of Placer (Rafton), 81 Cal. App. 4th 577 (2000)

Courts usually bend over backwards to

find that petitioners in CEQA cases have exhausted their administrative remedies. Tahoe Vista Concerned Citizens v. County of Placer (Rafton) is exceptional because the court in that case ruled that the petitioner did not exhaust its administrative remedies.

In that case, the real party developer applied for a conditional use permit to build 22 residential, lakefront units. The Tahoe Vista Concerned Citizens ("TVCC") submitted letters asserting that the project required an EIR. These letters were included in the planning commission's staff report, but TVCC did not raise any CEQA issues at the planning commission hearing.

On the form requesting an appeal to the Board of Supervisors, TVCC indicated that it was appealing only the conditional use permit, on the grounds that the project had insufficient parking. The staff report to the Board therefore did not mention any CEQA issues.

The discussion at the Board hearing concerned only the sufficiency of the parking. The Board adopted the negative declaration and approved the project.

The Superior Court ruled that TVCC failed to exhaust its administrative remedies.

Affirming, the Court of Appeal held that a party that raises CEQA issues at the planning commission level, but not at the subsequent Board level, may fail to exhaust its administrative remedies under CEQA, depending on the agency's particular rules.

The Court pointed out that the requirement of exhaustion of administrative remedies is a jurisdictional prerequisite, not a matter of judicial discretion. Further, CEQA does not abrogate the common law rule of exhaustion of administrative remedies, but must be read in conjunction with it.

The Court remarked that CEQA's exhaustion statute — Public Resources Code section 21177 — is not properly characterized as an exhaustion-of-administrative-remedies statute because it requires the CEQA issue to be raised before the agency decides whether to approve the negative declaration. A "remedy" redresses a wrong; a wrong cannot be redressed before it has occurred. Prior to the adoption of a negative declaration, there is no wrong to be remedied. The right to appear at an administrative hearing prior to the adoption of a negative declaration therefore is more properly characterized as a prerequisite to standing, according to the Court.

The Court noted that the Placer County Code required TVCC to specify the grounds of appeal. By failing to raise the CEQA issue before the Board, TVCC failed to exhaust its administrative remedies at the Board level. To conclude otherwise would allow litigants to omit arguments before the final administrative body, and turn the exhaustion doctrine on its head, cautioned the Court.

7. Friends of Davis v. City of Davis (Davis), 83 Cal. App. 4th 892 (2000)

Friends of Davis v. City of Davis (Davis) affirms that the focus of land use law is on ownership interests, not the identity of the tenant who happens to occupy the premises.

In Friends of Davis, the real party developer (also named "Davis") applied for design review for a retail center in downtown Davis. At the same time, the developer was negotiating a lease with Borders Bookstore to bring in Borders as a tenant.

Various residents calling themselves the Friends of Davis came forward to oppose the opening of a Borders Bookstore. The City approved the developer's design review application without requiring a subsequent or supplemental EIR.[8]

Upholding the Superior Court's denial of the Friends of Davis' mandamus petition, the Court of Appeal held that the City did not have authority to approve or deny retail leases under the guise of its design review ordinance. Although cities have broad authority to regulate the use of land, they do not have carte blanche to exclude unpopular retail businesses.

Next, the Court held that CEQA did not afford an independent basis of authority for the City to deny particular retail leases, or enlarge the City's authority beyond the scope of its design review ordinance.

Reviewing the evidence, the Court noted that the only change to the project at issue was the developer's selection of Borders as a tenant. While a new Borders in the community may create economic and social changes, this would not amount to a physical environmental change that would trigger further environmental study, the Court concluded.

8. Federation of Hillside and Canyon Associations v. City of Los Angeles, 83 Cal. App. 4th 1252 (2000)

Mitigation measures under CEQA usually withstand judicial challenge, causing some agencies to regard the approval of mitigation measures as almost an academic exercise. Federation of Hillside and Canyon Associations v. City of Los Angeles is a reminder that a mitigation measure whose efficacy is more theoretical than real may be struck down.

In Federation of Hillside and Canyon Associations, the City of Los Angeles adopted a "general plan framework" as part of its general plan. The general plan framework contained projections of future growth, and recommended amendments to the general plan to accommodate that growth. The general plan framework discussed mitigation measures for future traffic congestion but did not require any mitigation measure as a condition of development.

The EIR for the general plan framework stated that the significant impacts to transportation were mitigable but that implementation of the mitigation measures would require the cooperation of various agencies. The City's share of the costs of implementing the mitigation measures was expected to exceed its anticipated revenues.

The City approved the general plan framework and certified the EIR.

The Court of Appeal explained that under CEQA, mitigation measures must be required in, or incorporated into, the project (unless the agency adopts a statement of overriding considerations).[9] In addition, mitigation measures must be made enforceable through permit conditions, agreements, or other measures.[10]

The Court found no substantial evidence that the mitigation measure would mitigate the transportation impacts. Although the City had adopted transportation mitigation measures, it did not require that the transportation mitigation measures be implemented as a condition of development

under the general plan framework. The Court stressed that the City was not likely to implement the transportation mitigation measures, as they not only required the cooperation of other agencies, but also cost more to implement than the City's anticipated revenues.

9. Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors (Santa Margarita Limited), 84 Cal. App. 4th 221 (2000)

The most important development agreement case to date, Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors (Santa Margarita Limited) gives local agencies the green light to be innovative with development agreements.

The project in that case consisted of the development of 550 residential units, the dedication of large tracts of land for open space, and the construction of various public improvements.

The development agreement in dispute required real party Santa Margarita Limited to apply for a specific plan and prepare an EIR. It did not confer a vested right to complete the project, yet "froze" applicable land use regulations for five years. The agreement contemplated that after EIR certification and specific plan approval, the parties would negotiate a subsequent development agreement that would vest Santa Margarita Limited's rights to the project.

The Court of Appeal held that a development agreement is not invalid merely because the planning and design of the project had not been approved when the parties entered into the agreement, or because the agreement did not confer on the developer a vested right to complete the project, or because the project is subject to further discretionary approvals and contingencies.

The Court explained that the purpose of development agreements is to provide assurances to developers early on, especially if the project involves lengthy approvals. There is no requirement that construction be ready to commence, or that any particular stage of project approval occur, prior to entering into the agreement; indeed, the statutes expressly recognize that further discretionary approvals may be necessary execution of the agreement.[11]

The Court applied the substantial compliance doctrine to Government Code section 65865.2, which requires that development agreements specify the duration of the agreement, permitted uses of the property, density or intensity of use, maximum height and size of buildings, and provide for dedications of land for public purposes. Here, the development agreement substantially complied with section 65865.2, in the Court's opinion. Although the development agreement failed to address the maximum height and size of the proposed buildings, the height and size of the buildings were restricted by the County's zoning code, the Court reasoned.

10. Craik v. Santa Cruz County (Odenweller), 81 Cal. App. 4th 880 (2000)

It is hornbook law that variances should be granted only in the rare circumstances in which the necessary findings can be made (see Government Code section 65906). Some planning agencies nevertheless engage in the practice of liberally granting variances. Land use professionals who believe that they are fighting a losing battle on this front will find no solace in Craik v. Santa Cruz County (Odenweller).

In Craik, the County of Santa Cruz granted real party Odenweller not one but six variances for a house on Beach Drive: to allow three stories instead of two (notwithstanding that the County general plan prohibited three-story beachfront houses); to exceed the height limit; to reduce a setback requirement; to exceed the maximum allowed floor area; to allow a second-story deck; and to reduce front yard parking requirements.

The Court of Appeal held that the "special circumstances" which justify the granting of a variance under section 65906 are not limited to physical disparities between the subject property and neighboring properties, but may include the application of a law or regulation to the subject property.

Here, most of the houses on Beach Drive had been built before the more restrictive general plan and zoning ordinance became effective. Nineteen out of the 61 houses on Beach Drive were three-story structures. The Court was persuaded that these facts amounted to special circumstances which justified the grant of variances.

Craik is perhaps the most regrettable land use decision of 2000. By statute, variances must not be a grant of special privileges,[12] yet it is difficult to explain the six variances upheld in Craik as anything but that. The only ray of light to come out of the opinion is the hope that future decisions will limit Craik to its unique facts.

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Governor Finishes his Signatures and Vetoes on Bills Reported on by the Executive Committee

By Debra A. Greenfield, Chair, Legislative Committee

Here is the final status of bills the Executive Committee has been following in 2000 which made it to the Governor's desk. If you would like to know the status of any bill, or if you would like to view a copy of the bill or the analysis, you can view the information online at *www.sen.ca.gov*.

AB 1838 (Leonard)
Political Reform Act

This bill would express the intent of the Legislature that the Fair Political Practices Commission, as part of its Conflict of Interest Regulatory Improvement Project of 1999-2000, adopt regulations that would accomplish specified goals relative to the disqualification of public officials of local government agencies in governmental decisions that do not directly and materially affect an official's economic interest. *Chapter 352.*

AB 2799 (Shelley)
Public Records Act

This bill would amend the Public Records Act to provide for, among other things, the disclosure of public records in any electronic form in which the agency keeps them. *Chapter 982.*

SB 89 (Escutia)
Environmental Quality Minority and Low Income Populations

This bill would require the Secretary for Environmental Protection, on or before January 15, 2002, to convene a Working Group on Environmental Justice, composed of various representatives, as specified, to assist the California Environmental Protection Agency in developing an interagency environmental justice strategy. The bill would require the working group to take various actions relating to the development and implementation of environmental justice strategies. *Chapter 728.*

SB 1327 (Escutia)
Personnel Employee Records

Harmonizes the law applicable to specified employers with regard to inspection of personnel files. Requires an employer to make the contents of the personnel files available to an employee at reasonable intervals and reasonable times, as provided, but would exempt from inspection, records relating to the investigation of a criminal offense, letters of reference, and specified ratings and reports. *Chapter 886.*

SB 1822 (Bowen)
Monitoring of Employee Records

This bill would add a new section to the Labor Code, to require employers who intended to monitor employees' electronic mail or computer records to first advise employees in writing of the employer's workplace privacy and electronic monitoring policies and practices, and to require written employee verification of receipt. *Vetoed.*

SB 2027 (Sher) Public Records Act

This bill would amend the Public Records Act to provide for a discretionary Court imposed fine of up to $100 a day where access to public records is improperly delayed, authorizes opinions on compliance by Attorney General and requires written denial of record requests. *Vetoed.*

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Prudence Kay Poppink Public Law Section's Public Lawyer of the Year Presentation

September 16, 2000

San Diego

Public Lawyer of the Year Prudence Kay Poppink with Chief Justice Ronald M. George.

PRESENTATION BY CHIEF JUSTICE RONALD M. GEORGE

Good afternoon and thank you for inviting me to participate in this presentation. The role of the public lawyer is ever more important today as the intricacies of the legal process affect so many different aspects of every individual's life.

The role of public lawyers - ensuring that our public agencies and entities serve the public's interest in an effective and fair manner - is crucial to maintaining the rule of law in our society.

Today I am pleased, on behalf of the Public Law Section, to present the Public Lawyer of the Year Award to Prudence Kay Poppink. She has specialized in employment and housing law for 25 years, and for the past 16 years has worked with the California Fair Employment and Housing Commission. The last seven years have seen her serving as a Commission Hearing Officer, responsible for adjudicating cases of alleged employment and housing discrimination for the Commission.

Ms. Poppink's service at the Commission has covered many areas. She has served as a Supervising Hearing Officer and Commission Counsel, overseeing the work of other attorneys in the office. She personally has handled some of the most complex and lengthy hearings before the Commission, and has worked on issues including the recognition of HIV-status and AIDS as a disability, as well as a university's liability for a professor's sexual harassment of a student.

In addition to her work on individual cases, Ms. Poppink has helped to shepherd important bills relating to the Fair Employment and Housing Act through the Legislature. She also worked closely with former Assemblywoman Gwen Moore on the 1993 Moore-Brown-Roberti Act, known as the California Family Rights Act. Following enactment of that measure, she worked with the Commission to draft regulations implementing it and has continued to provide training on its provisions to employers, employees, attorneys, and personnel form the Department of Fair Employment and Housing.

Before joining the Commission's staff, Ms. Poppink worked for four years with that Department prosecuting employment and housing discrimination complaints on behalf of the State. Before that, she worked for five years as a Staff Attorney at the Employment Law Center, concentrating on disability issues.

Ms. Poppink has had a career noteworthy for the many different ways in which her knowledge and expertise in employment and housing discrimination have been put to use in the public sector. Prosecuting attorney, hearing officer, trainer, facilitator of legislative effort, expert, and legal innovator, she has found a multitude of ways to put her skills to work for the public benefit.

In these days of astronomical salaries and the lure of dot.com fortunes tempting many lawyers, it is especially important that we join together to celebrate the accomplishments of an attorney who had dedicated herself not to the bottom line, but to the public good.

The Judicial Council of California, the constitutional entity charged with oversight for the statewide administration of justice, has set as its priority improving access and fairness in our justice system. Ms. Poppink's career certainly has been one aimed at the same goal - not only in the substance of her practice, but also as reflected in her dedication to ensuring that the public's agencies are serving the public well.

A debate is raging in some parts of the legal profession about whether we should continue to define the practice of law as a profession or concede that its primary nature now is the same as any business. I am unswervingly on the side of considering law to be first and foremost a profession - and of continuing to expect that lawyers will comport themselves with proper deference for the transcendent values of the law that make it a professional calling.

Sol Linowitz, a noted writer on the legal profession who has argued vigorously for rededication to the ideals of the practice of law, observed in a 1994 speech that "too many lawyers may have forgotten what they are supposed to be. Too many fail to remember that in entering the profession, they assume solemn responsibilities and obligations which are an integral part of their calling." A license to practice law requires its holder to act as an officer of the court and, in this age when many attorneys do not enter a courtroom, I would extend that charge to protecting the rule of law.

We are fortunate that so many fine and dedicated attorneys have devoted themselves to working for - and on behalf of - the public sector. Ms. Poppink's career demonstrates the many pathways that role can take. I invite you to join with me in congratulating her on her accomplishments, and in thanking her for her dedicated service to the people of California and to the profession of the law.

* *Prudence Kay Poppink, former Hearing Officer of the Fair Employment and Housing Commission, passed away November 16, 2000, of breast cancer.*

ACCEPTANCE SPEECH BY PRUDENCE KAY POPPINK

I am extremely honored to receive this award today. Since I just retired from the Fair Employment and Housing Commission for health reasons on September 1, it is an especially poignant and meaningful farewell tribute.

When I asked my colleagues what I should say today, they told me to speak from my heart and talk about two of the passions in my life, employment discrimination law and my daughters! There is a connection - my daughters, who are here today, are ages 19 and 22, young women just entering the California workplace. And my younger daughter, Charlotte, has had a disability - insulin dependent diabetes - since she was 12. Since all 25 years of my public legal career has been devoted to eradicating employment discrimination. I'd like to think that some of my achievements in this area will allow my daughters - and all Californians - to work in a less discriminatory workplace than I had when I started out.

In 1971, before the federal government was even added to Title VII of the Civil Rights Act, I experienced sex discrimination by a federal agency. The federal government had just created a new agency - ACTION -, combining both Peace Corps and VISTA. Not only was I a returned Peace Corps Volunteer, but I'd also had experience in both Peace Corps and VISTA training and recruitment. I was working for VISTA recruitment when two of my male colleagues disappeared for a few days and returned to the office looking very satisfied. Unbeknownst to any of us, they had been invited to a meeting with the new ACTION officials, where all of the 28 district manager jobs nationwide had been given away - to 28 white males, including my two colleagues. No open recruitment. No applications. I was furious, since my Peace Corps and VISTA credentials were far superior to those of my two male co-workers.

Neophyte that I was, I filed a written complaint and eventually received a settlement in the form of an offer of a district manager job. I declined the offer, having determined in the mean time to go to law school to help others facing such discrimination. There, at Hastings, I was lucky enough to take some of the very first employment law classes from former Supreme Court Justice Joe Grodin.

After law school, I started as a staff attorney at a public interest law firm, the Employment Law Center, a project of the Legal Aid Society of San Francisco. There, I began to specialize in disability discrimination in the workplace. This was a new legal field in the 1970's, and it was cutting edge work. From that era, I'm most proud of having established - through litigating in federal court - a private right of action under section 504 of the Rehabilitation Act, a hotly debated question at the time.

In 1980, I moved over to the Department of Fair Employment and Housing and prosecuted cases under the state statute, the Fair Employment and Housing Act. I continued my love for disability law and was privileged to argue the American National Insurance Co. case[1] before the California Supreme Court, a case that established a very broad definition of "physical handicap" under FEHA.

In 1984, I landed at the Commission, where I spent the rest of my legal career. The Commission is a quasi-judicial body that hears and decides individual cases of employment and housing discrimination and also interprets and enforces FEHA. At the Commission, there were no more Supreme Court arguments, but there was plenty of behind-the-scenes work to ensure that FEHA remained a strong civil rights statute.

Those were interesting times at the Commission and I want to share a bit of the dynamics with you. As you know, for 16 years, from 1982 to 1998, California had a Republican administration under Governors Deukmejian and Wilson. Since the Governor appoints the Fair Employment and Housing Commissioners, we had a completely Republican Commission for 16 years

Looking back, I am so proud of what we accomplished during those 16 years. We worked together, staff and Commission, and the result was a stronger FEHA in 1998 than we had had in 1982. Let me just give you two examples where our Commission ended up in the forefront of civil rights issues. These examples are from the days before I became a Hearing Officer for the Commission and thus, I was able to work closely with the Commissioners on these cases, helping them formulate their ideas and drafting decisions for their approval.

In the mid-1980's, the Commission issued a unanimous precedential decision - the first in the country by any judicial tribunal- holding that HIV-status and AIDS were physical handicaps under FEHA. This was phenomenal at the time -even the federal Department of Justice had issued an opinion letter saying that HIV-status and AIDS were not disabilities under the Rehabilitation Act.

Then, a few years later, the Commission decided - again for the first time anywhere in the country - that an employer's fetal protection plan was unlawful sex discrimination under FEHA. This particular employer had a policy against hiring fertile women - in this case, all women between ages five and 55 - in jobs involving working with lead, because of the potential reproductive hazard. Even a 54-year old nun could not get a job under its policy! At the time of the Commission's decision, all of the federal courts that had decided this issue under Title VII had ruled that such fetal protection policies were not unlawful sex discrimination. Of course, a year or so after the Commission's decision, the United States Supreme Court held in the Johnson Controls case that such plans were unlawful sex discrimination. We felt very vindicated.

For many years, I also was the Commission's regulations coordinator. I believe in regulations; they provide a tremendous opportunity to interpret a statute and to educate the public. In 1991, after many years of effort, the California Family Rights Act (CFRA) was passed into law - within

FEHA - and I volunteered to write the regulations. I never regretted that decision, even after having to draft two different sets of regulations, one right after the other, as the law was quickly amended. It was a project that engaged the Commission and I want to thank former Commissioner Cheng who is here today for her dedicated work on these regulations, as well as on so many other projects. These regulations also gave me the opportunity to do some of my best public lawyering. I made myself completely available to the public to answer their CFRA questions and became renowned as the state expert on CFRA - I used to call myself the horse's mouth!

Finally, for 15 years or so, I also handled legislation for the Commission. In this capacity, I was privileged to work with legislators and to help draft some of the language that appears in the FEHA today, such as its strong anti-harassment provisions. On several occasions, the Commission itself sponsored legislation strengthening FEHA and I walked with them through that process. Most of the Commissioners' legislative efforts turned out to be bipartisan since - with one exception - they always had to rely on Democratic legislators to carry FEHA bills. It was good government and I was proud to be part of it. This past June, the Commission held a retirement function for me and Assembly Member Sheila Kuehl honored me by speaking at it. She surprised me by announcing that she had amended a bill she was carrying - AB 2222 - to name it the Prudence K. Poppink Act. AB 2222 strengthens FEHA's workplace protections for persons with disabilities, which is an issue dear to my heart. The bill is currently on the Governor's desk, awaiting his signature. I was and continue to be stunned by this honor - I had never expected such a public acknowledgement.[2]

In closing, I want to say that all of our work at the Commission is collaborative and I want to honor that. The Commission staff has always worked as one with a collective mission - the development of a strong civil rights law for the state of California. I want to acknowledge my colleagues who came to see me receive this award today and to let you know that this award really belongs to all of us.

Finally, I am so glad that my daughters are here with me today - as are my husband and my brother, sister, and sister-in-law. I'm hoping that my daughters will take away with them today a sense of the importance of public service, as well as an increased awareness of employment discrimination issues. And, hopefully, because of all of our collective work in this field, they will never have to file a discrimination complaint as did I.

Thank you very much for this award and for coming today.

Footnotes

1 American National Ins. Co. v. Fair Employment and Housing Com. 32 Cal.3d 603 (1982).

2 AB 2222 is now Chapter 1049, Statutes of 2000.

Applications Are Now Being Accepted To Serve on

The Executive Committee of the Public Law Section

The Public Law Section is looking for a few good lawyers to serve on its governing board, the Executive Committee. Interested applicants should have experience in the area of public law, and a proven track record of commitment to volunteer service. The Committee includes representatives from the public sector and private sector in all levels of government practice.

The Executive Committee is responsible for:

- *Designing and implementing various educational programs*
- *Publishing the quarterly Public Law Journal*
- *Taking positions on proposed legislation in the area of public law*
- *Obtaining grant moneys to fund special projects*
- *Continually seeking to implement new and innovative programs*

If you have the necessary skills and experience, and a genuine interest in promoting the goals and objectives of the Public Law Section, we invite you to apply to serve on the Executive Committee. If you have any questions, call Larry Duran at (916) 874-8558. Send your résumé and a cover letter by March 1, 2001 to:

Public Law Section Administrator • State Bar of California • 180 Howard Street • San Francisco, CA 94105

A Message From The Chair

By Henry D. Nanjo

Hello again, and hope you had a Happy Holidays and a great start to the New Year. I'm glad I got a chance to meet some of you at the Annual Meeting. For those of you who did not attend, we had a fantastic time and a great honoree for Public Lawyer of the Year. Unfortunately, our honoree, Prudence K. Poppink, passed away in November. It was amazing to hear Ms. Poppink speak about her experience, and dedication to public service. Her work with the Fair Employment and Housing Commission truly reflected an individual dedicated to public service in the truest sense.

In addition, to the two other wonderful seminars put on by the Public Law Section, one stood out in also illustrating dedication to public service. Our speaker on our Public Law program was attorney Cindy A. Ossias. As you may remember, Ms. Ossias was the public lawyer working for the Dept. of Insurance who was put in the difficult position of balancing her interests of her Department and her duty to public. She was not only subject to action by her department, but was the subject of a State Bar investigation as well. In December, the word came down that the State Bar believed that Cindy acted appropriately and without ethical violations. This is news that many of us hoped would be the outcome, but it made Cindy's position no less difficult. This was a truly remarkable panel, and was added to by Cindy's insights. She was also named one of the California Lawyer's Attorneys of the Year.

This issue of the Public Law Journal includes a wrap up of the past year's significant land use decisions, a 2000 legislative report and an article on E-Government and Electronic Signatures by Jeffrey Goldfine. The effect of technology has impacted public lawyers as well. Many public lawyers and their offices have moved to completely electronic research and electronic libraries. The use of e-mail and other technology driven improvements have changed the way we practice law. However, in spite of all these changes, the public lawyer helps, serves or works for the public or the public good. And as in the case of Cindy Ossias, we may be called upon to prove our commitment to that public at any time.

In an effort to assist you to "connect" technologically, don't forget about the Public Law Section's web site at www.calbar.org/publiclaw. I invite and challenge you to contact me to let me know what you like or don't like about the section, Public Law Journal, or the activities of the section. Finally, if you would like to contribute an article, have a story to tell or would like to share your "expertise" with the rest of the section contact either myself or our editor, Phyllis Cheng.

This issue marks Phyllis' first issue as the new Public Law Journal Editor. Thanks and Congratulations to Phyllis! Also, we have had the extreme fortune of having a great editor for the prior Journals. I would like to take this opportunity to thank Heather Mahood for a job well done!

Remember; feel free to contact me any time either by telephone at (916) 874-5567 or by e-mail at *nanjohd@saccounty.net*.

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